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The Duty of Fair Representation and its Applicability When a Union Refuses to Process an Individual's Grievance

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NOTES

THE DUTY OF FAIR REPRESENTATION AND ITS APPLICABILITY WHEN A UNION REFUSES TO PROCESS AN INDIVIDUAL'S GRIEVANCE

I. Introduction

Suppose that one is employed by an employer having a collective bargaining agreement with a union representing all of the non-salaried employees. The agreement provides that no employee shall be discharged except for "just cause," and it also sets up a four-step grievance procedure culminating in arbitration. Suppose further, that the employee is discharged and he files a grievance with his union claiming that his discharge was not for "just cause" and was, therefore, in violation of the collective bargaining agreement.

The object of this note is to explore the doctrine of the duty of fair representation as a possible avenue of relief available to such an employee when his union either refuses to institute the grievance machinery in his behalf, or when it prosecutes his grievance only through the first few steps of the grievance procedure and refuses to press it further.

II. Possible Alternatives for Relief

A. Action to Compel the Employer to Arbitrate Under Section 9(a) of the National Labor Relations Act.

From the language of the first proviso of section 9(a) of the National Labor Relations Act[1] it would appear that such employee has the right to take his unprocessed grievance directly to his employer and have it adjusted.[2]

Professor Archibald Cox argues, however, that the 9(a) proviso creates no such affirmative right in the individual

1. National Labor Relations Act (Wagner Act) (hereinafter cited at NLRA) § 9(a), 29 U.S.C. § 159(a) (1964). After giving the majority union exclusive bargaining capacity, section 9(a) is qualified by the following proviso:

> *Provided,* That any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given the opportunity to be present at such adjustment.

2. *See* Summers, *Individual Rights in Collective Agreements and Arbitration,* 37 N.Y.U.L. Rev. 362, 394 (1962).

employee but that it merely provides that the employer's duty to bargain with the majority union is not violated if he chooses to hear and adjust grievances with individual employees.[3] The Cox approach was accepted by the Second Circuit in 1961[4] and by the Sixth Circuit in 1965.[5] Further, the Supreme Court has given seeming acceptance to Cox's view, although never expressly mentioning section 9(a).

> [W]e do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement.[6]

Thus, it would appear that the 9(a) proviso is of no help to an employee whose union has refused to process his grievance.

B. Action Against Employer for Breaching the Collective Agreement under Section 301(a) of the Labor Management Relations Act.

Because section 9(a) of the NLRA does not give the employee any right to have his grievance arbitrated, his next alternative is to bring suit against his employer for breaching the collective agreement.

A significant development in this area is the case of *Textile Workers Union of America v. Lincoln Mills.*[7] There the Supreme Court held that Section 301 of the Labor Management Relations Act[8] authorizes the federal courts to fashion a body of federal labor law based upon national labor policy. In a later case the Court held, by reversing an earlier decision,[9] that section 301 gives the federal courts jurisdiction to hear complaints by individual employees against their employer for

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3. *See* Cox, *Rights Under a Labor Agreement,* 69 HARV. L. REV. 601, 621-24 (1956).

4. Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179 (2d Cir. 1962), *cited with approval in* Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965).

5. *See* Broniman v. Great Atl. & Pac. Tea Co., 353 F.2d 559, 562 (6th Cir. 1965), *cert. denied,* 384 U.S. 907 (1966). *Cf.* Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963).

6. Vaca v. Sipes, 386 U.S. 171, 191 (1967).

7. 353 U.S. 448 (1957).

8. Labor Management Relations Act (Taft-Hartley Act) (hereinafter cited as LMRA) § 301, 29 U.S.C. § 185 (1964).

9. Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955).

violation of the collective bargaining agreement.[10] The stage was, therefore, set for a case-by-case determination by the courts of the extent to which federal labor law protects an individual employee whose union refuses to press his grievance which is based upon the employer's alleged breach of contract.

C. Action Against the Union under the Duty of Fair Representation.

The last alternative of relief available to the hypothetical employee is to sue his union for failure to process his grievance. There is a chance, although very slight, that he may be able to show that the union committed a breach of its "duty of fair representation," for which he is entitled to a remedy.

A recent Supreme Court case, *Vaca v. Sipes*,[11] has increased the importance of the duty of fair representation by requiring an individual employee to show such a breach before he can sue his employer for violation of the collective agreement. The ramifications of this decision will be explored following a discussion of the duty of fair representation in the context of grievance handling.

III. The Duty of Fair Representation

A. Generally

In the early years of national labor policy, sweeping powers were given to bargaining representatives once they were designated by a majority of the workers in a bargaining unit. To further the federal ideal of preserving industrial harmony, the individual employee was required to surrender completely his right of self-representation to the union which represented him. It soon became apparent, however, that the individual worker was susceptible to frequent abuse at the hands of the union and that the unions' power needed to be limited. This limit had its genesis in *Steele v. Louisville & Nashville Railroad*[12] and was termed "the duty of fair representation." There the union had negotiated a collective bargaining agreement which deprived Negroes of their seniority rights. The Court held that because the Railway Labor Act[13] allows the majority union to

10. Smith v. Evening News Ass'n, 371 U.S. 195 (1962).
11. 386 U.S. 171, 185-87 (1967).
12. 323 U.S. 192 (1944).
13. Railway Labor Act, 45 U.S.C. §§ 151-88 (1964).

be the exclusive bargaining representative for all employees in the unit, the Act, therefore, imposes upon that union the duty to represent all employees in the unit fairly. In a famous analogy the Court stated:

> We think the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates.[14]

Section 9(a) of the National Labor Relations Act,[15] which confers exclusive bargaining power upon a majority union, also imposes the duty of fair representation on that union.[16] Thus, both the RLA and the NLRA have been read as imposing this duty upon the majority union although such duty is explicit in neither statute.

In *Conley v. Gibson*[17] the Court held that the duty of fair representation embraces the administration, as well as the negotiation, of the collective bargaining agreement. Based upon the above premise, the courts have recognized that this duty prohibits the majority union from discriminating between its members and non-members by refusing to press the latters' grievances.[18] A union, therefore, can commit a breach of its duty by its conduct in handling employees' grievances. What kind of union conduct must the employee prove in order to make out a case of breach of duty against the union?

B. Judicial Standards

In the *Steele* case the Court gave some hint at a standard to be applied in finding a breach of the duty of fair representation by stating that the union must exercise its power "without hostile discrimination, fairly, impartially, and in good faith."[19]

14. Steele v. Louisville & N. R.R., 323 U.S. 192, 202 (1944).

15. NLRA § 9(a), 29 U.S.C. § 159(a) (1964). The duty of fair representation is to be found (implied) in the language of section 9(a) which makes the majority union the *exclusive* bargaining representative for the unit.

16. Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964), *rehearing denied*, 376 U.S. 935 (1964); Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955), *reversing per curiam*, 223 F.2d 739 (5th Cir. 1955); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Wallace Corp. v. NLRB, 323 U.S. 248 (1944) (dictum).

17. 355 U.S. 41 (1957).

18. Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945).

19. Steele v. Louisville & N. R.R., 323 U.S. 192, 204 (1944).

While this language appeared to afford significant protection to the individual, the Court, in *Ford Motor Co. v. Huffman*,[20] restricted application of the fair representation doctrine to only the most blatant cases of union misconduct by stating:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees. . . . The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A *wide range of reasonableness* must be allowed a statutory bargaining representative in serving the unit it represents subject always to complete good faith and honesty of purpose in the exercise of its discretion.[21]

This so-called good faith discretion test was before the Court in *Humphrey v. Moore*[22] in which there was an action against the union and employer by an employee. The essence of his claim against the union was that it had breached its duty of fair representation by the manner in which it had handled his grievance. Finding that there had been no breach of the duty, the Court said:

> Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes.[23]

In *Vaca v. Sipes*,[24] perhaps the most significant duty of fair representation case since *Steele*, the Court reaffirmed the good faith standard and stated:

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in *bad faith*.[25]

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20. 345 U.S. 330 (1953).

21. *Id.* at 338 (emphasis added).

22. 375 U.S. 335 (1964), *rehearing denied*, 376 U.S. 935 (1964).

23. *Id.* at 349.

24. 386 U.S. 171 (1967). *See* Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 88 S.Ct. 53 (1967).

25. Vaca v. Sipes, 386 U.S. 171, 190 (1967) (emphasis added).

Whether the union has acted in good faith depends upon the facts of each case.[26]

The earliest case on breach of the duty of fair representation with regard to grievance handling was a 1945 Fifth Circuit decision in which the court recognized that refusing to process the grievances of non-union members in the bargaining unit would violate the duty.[27] Later, Professor Archibald Cox expressed belief that the union would be "guilty of a breach of duty if it refused to press a justifiable grievance either because of laziness, prejudice or unwillingness to expend money on behalf of employees who are not members of the union."[28] Recently, the Fifth Circuit held that a union commits a breach of its duty of fair representation by refusing to process the grievances of its Negro members.[29] Most cases against unions for refusal to process, however, involve no conduct so blatant as racial discrimination. The good faith discretion standard appears inadequate to protect the individual employee from the more subtle forms of union misconduct in refusing to press grievances.

The Sixth Circuit has held that when a union, because of its own mistake in interpreting the collective bargaining agreement, refuses to press a grievance, there is no breach of its duty if the union's refusal is made in good faith.[30] Further, when a complaint alleges only that the employee was "discriminated" against, it fails to charge the union with "intent" to discriminate, and the union should be granted a summary judgment.[31] When a union, however, agrees to process a grievance only upon condition that the employee sign a statement releasing the union from damage liability, such a "conditional" refusal to process is a breach of the union's duty.[32] Because a threat by a union

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26. *See* Trotter v. Amalgamated Ass'n of Street Elec. Ry. & Motor Coach Employees, 309 F.2d 584 (6th Cir. 1962); Pekar v. Local 181, United Brewery Workers, 311 F.2d 628 (6th Cir. 1962).

27. Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945).

28. Cox, *Individual Enforcement of Collective Bargaining Agreements,* 8 LAB. L.J. 850, 858 (1957).

29. Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. (1966), *cert. denied,* 88 S.Ct. 53 (1967).

30. Pekar v. Local 181, United Brewery Workers, 311 F.2d 628 (6th Cir. 1962).

31. Palmieri v. United Steelworkers, 270 F. Supp. 5 (W.D. Pa. 1967). *See also* Gainey v. Brotherhood of Ry. & S.S. Clerks, 313 F.2d 318 (3d Cir. 1963).

32. Confectionery & Tobacco Drivers & Warehousemen's Local 805 v. NLRB, 312 F.2d 108 (2d Cir. 1963).

to breach its duty of fair representation is a breach in itself,[33] it would appear that a threat made in bad faith not to process a grievance could likewise breach the duty.

One of the most effective defenses than can be presented by a union charged with breaching its duty in refusing to press a grievance, is that, in good faith, it believed the grievance was not meritorious. Such a defense is so effective because "a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious . . . ."[34] The employee must also show "arbitrary or bad-faith conduct on the part of the Union in processing his grievance."[35] Placing this burden of proving the union's bad faith upon the plaintiff makes his case extremely difficult. The Supreme Court has stated that the union's bad faith may be proved by showing that it has "ignored [the plaintiff's] complaint or . . . processed the grievance in a perfunctory manner."[36] The union, however, can apparently overcome such an allegation of bad faith merely by proving that its decision not to press the grievance was reached only after thorough investigation.[37] Making it even more difficult for the plaintiff to show bad faith is a Fifth Circuit decision saying that courts should give union grievance decisions "a presumption of honesty and fairness."[38] Further, one court has said that the union has a duty to screen grievances[39] while another has said that "the union must proceed with caution in processing individual grievances . . . ."[40]

33. Truck Drivers & Helpers, Local 568 v. NLRB, 379 F.2d 137 (D.C. Cir. 1967).

34. Vaca v. Sipes, 386 U.S. 171, 195 (1967). *See also* Local 12, United Rubber Workers v. NLRB, 368 F.2d 12, 17 (5th Cir. 1966), *cert. denied,* 88 S. Ct. 53 (1967); Palmieri v. United Steelworkers, 270 F. Supp. 5, 11 (W.D. Pa. 1967).

35. Vaca v. Sipes, 386 U.S. 171, 193 (1967). *See also* Local 12, United Rubber Workers v. NLRB, 368 F.2d 12, 17 (5th Cir. 1966), *cert. denied,* 88 S. Ct. 53 (1967); Palmieri v. United Steelworkers, 270 F. Supp. 5, 11 (W.D. Pa. 1967).

36. Vaca v. Sipes, 386 U.S. 171, 194 (1967).

37. *See* Vaca v. Sipes, 386 U.S. 171 (1967); Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied,* 88 S. Ct. 53 (1967); Freedman v. National Maritime Union, 347 F.2d 167 (2d Cir. 1965), *cert. denied,* 383 U.S. 917 (1966); Ostrofsky v. United Steelworkers, 273 F.2d 614 (4th Cir. 1960), *cert. denied,* 363 U.S. 849 (1960); Hill v. Aro Corp. 275 F. Supp. 482 (N.D. Ohio 1967); Palmieri v. United Steelworkers, 270 F. Supp. 5 (W.D. Pa. 1967); Brandt v. United States Lines, Inc., 246 F. Supp. 982 (S.D.N.Y. 1964).

38. Stewart v. Day & Zimmermann, Inc., 294 F.2d 7, 11 (5th Cir. 1961).

39. Ostrofsky v. United Steelworkers, 273 F.2d 614 (4th Cir. 1960), *cert. denied,* 363 U.S. 849 (1960).

40. Foltz v. Harding Glass Co., 263 F. Supp. 959, 964 (W.D. Ark. 1967).

Thus, the union is given a great deal of discretion in handling grievances subject only to the limitation that this discretion be exercised in good faith. Such a test weighs the odds heavily in favor of the union in fair representation cases brought for refusal to process because of the difficulty of showing the union's bad faith. The courts justify this apparent inequity on the ground that judicial interference with union discretion over grievance handling "would surely weaken the collective bargaining and grievance processes."[41]

The good faith discretion test has drawn abundant criticism.[42] One reason that the courts have failed to develop a more adequate standard may be that they lack sufficient familiarity with the realities of industrial life to detect the many ways a union can abuse the rights of the individual employee under the guise of protecting "the interests of the majority." The National Labor Relations Board, because of its expertise in the area of administration of collective agreements, may be the more logical body to formulate workable standards.[43]

IV. The Duty of Fair Presentation as an Unfair Labor Practice: Pre-emption

In *Humphrey v. Moore*[44] the Supreme Court implied that an allegation that the union breached its duty of fair representation may also state a cause of action under section 301 of the LMRA[45] for violation of the collective bargaining agreement. Mr. Justice

41. Humphrey v. Moore, 375 U.S. 335, 350 (1964), *rehearing denied*, 376 U.S. 935 (1964).

42. *See, e.g.*, Blumrosen, *Duty of Fair Representation: Individual Rights Under Collective Contracts—What Should The Rule Be?*, 15 LAB. L.J. 598, 599 (1964); Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1485 (1963); Blumrosen, *Legal Protection For Critical Job Interests: Union-Management Autonomy Versus Employee Autonomy*, 13 RUTGERS L. REV. 631, 655 (1959); Murphy, *The Duty of Fair Representation Under Taft-Hartley*, 30 Mo. L. REV. 373, 375-76, 389 (1965); Rosen, *The Individual Worker in Grievance Arbitration: Still Another Look at the Problem*, 24 MD. L. REV. 233, 287 (1964); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L. J. 1327, 1339, 1357 (1958); Note, *Refusal to Process a Grievance, The NLRB, and the Duty of Fair Representation: A Plea For Pre-emption*, 26 U. PITT. L. REV. 539, 601-02 (1965); Comment, *Federal Protection of Individual Rights Under Labor Contracts*, 73 YALE L. J. 1215, 1234 (1964).

43. *See* note, *Refusal to Process a Grievance, The NLRB, and the Duty of Fair Representation: A Plea for Pre-emption*, 26 U. PITT. L. REV. 593 (1965).

44. 375 U.S. 335 (1964), *rehearing denied*, 376 U.S. 935 (1964).

45. LMRA § 301, 29 U.S.C. § 185 (1964).

Goldberg concurred in the result, but he disagreed with any theory that when a union breaches its duty, it also violates the collective agreement. His disagreement was based upon a belief that the duty of fair representation is "derived not from the collective bargaining contract but from the National Labor Relations Act . . . ."[46]

Humphrey, therefore, raises the question of whether an individual employee, under section 301, can sue his union for breaching its duty without also alleging that the employer has violated the collective bargaining agreement. It has been suggested that "*Humphrey* might be interpreted to mean that where a cause of action *otherwise* is alleged under 301, then the fair representation issue may also be litigated, in the nature of ancilliary jurisdiction."[47] When a cause of action, however, is not otherwise alleged under 301, *i.e.*, the individual sues his union for breach of the duty and does not also sue his employer for *breach of contract*, then the fair representation issue might not be allowed to be litigated under section 301. This is because section 301(a) gives federal courts jurisdiction over "suits *for violation of contracts* between an employer and a labor organization . . .,"[48] and Goldberg is possibly correct in saying a breach of the duty by a union does not violate the collective agreement.

No case has squarely faced the issue of whether an employee can sue his union under section 301(a) for breaching its duty without also suing his employer for violating the collective agreement. If, however, it is held that such a "pure" breach of duty suit against the union cannot be brought under section 301(a), then the courts' jurisdiction over such cases may appear to be "pre-empted" by that of the NLRB.

In the 1962 case of *Miranda Fuel Co.*[49] the NLRB, for the first time, held that a union commits an unfair labor practice when it breaches its duty of fair representation. There the Board reasoned that the concept of fair representation, which

46. Humphrey v. Moore, 375 U.S. 335, 351 (1964) (concurring opinion), *rehearing denied*, 376 U.S. 935 (1964).

47. Murphy, *The Duty of Fair Representation Under Taft-Hartley*, 30 Mo. L. REV. 373, 387 (1965) (emphasis added). *But see* Mandel v. Highway & Local Motor Freight Drivers, Local 707, 246 F. Supp. 805 (S.D.N.Y. 1964).

48. LMRA § 301(a), 29 U.S.C. § 185 (a) (1964) (emphasis added).

49. 140 N.L.R.B. 181 (1962).

has been implied[50] from section 9(a) of the NLRA,[51] gives rise to a corresponding "right" of employees under section 7[52] to be free from "unfair or irrelevant or invidious treatment"[53] from their union. Further, since section 8(b)(1)(A)[54] prohibits restraint or coercion of employees in the exercise of their section 7 rights, a union commits an 8(b)(1)(A) unfair labor practice when it violates the duty of fair representation.[55]

On appeal, the Second Circuit[56] denied enforcement of the Board order in *Miranda*; however, the Fifth Circuit has recently followed the *Miranda* doctrine.[57] There the court found that the union had breached its duty of fair representation by refusing to process the grievances of its Negro members. More important, however, was the court's reliance upon the *Miranda* doctrine in holding that the union's breach of the duty constituted an 8(b)(1)(A) unfair labor practice.[58] Significantly, the Supreme Court in 1967[59] gave implied acceptance to the *Miranda* doctrine by apparently approving of the above-mentioned Fifth Circuit case.[60]

The implication of the *Miranda* doctrine is that the NLRB now has jurisdiction of cases against unions for breach of the duty of fair representation because such a breach also constitutes an unfair labor practice. Recognizing this, the next inquiry is whether the Board's jurisdiction is "exclusive;" *i.e.*, whether judicial cognizance of fair representation cases has been "preempted" by Board jurisdiction.

In *San Diego Building Trades Council v. Garmon*[61] the Supreme Court laid down the general rule that neither state nor federal courts have jurisdiction over suits directly involving "activity [which] is arguably subject to §7 or §8 of the

50. Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955), *reversing per curiam*, 223 F.2d 739 (5th Cir. 1955); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Wallace Corp. v. NLRB, 323 U.S. 248 (1944) (dictum).

51. NLRA § 9(a), 29 U.S.C. § 159(a) (1964).

52. NLRA § 7, 29 U.S.C. § 157 (1964).

53. Miranda Fuel Co., 140 N.L.R.B. 181, 185 (1962).

54. NLRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1964).

55. Miranda Fuel Co., 140 N.L.R.B. 181, 185 (1962).

56. NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963).

57. Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 88 S. Ct. 53 (1967).

58. *Id.* at 19-22.

59. *See* Vaca v. Sipes, 386 U.S. 171, 178 (1967).

60. Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966); *cert. denied*, 88 S. Ct. 53 (1967).

61. 359 U.S. 230 (1959).

Act . . . ."[62] Thus, the Board is said to have exclusive jurisdiction over unfair labor practice cases; *i.e.*, the Board's jurisdiction "pre-empts" judicial cognizance of unfair labor practice cases.

Since a union which breaches its duty of fair representation thereby commits an unfair labor practice, it would appear, applying the *Garmon* pre-emption rule, that the NLRB would now have exclusive jurisdiction of fair representation cases.

The Supreme Court recently faced this pre-emption question in the *Vaca* case.[63] There the Court stated various exceptions[64] to the *Garmon* principle of exclusive Board jurisdiction and said that such exceptions

> demonstrate that the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interest being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies.[65]

The Court then held that the doctrine of pre-emption was not applicable to that case. While the Court did not expressly state that pre-emption never applies to fair representation suits, this was implied by the language used.[66] Whether this conclusion is correct has no real effect on the usual refusal to process cases in which the employer is being sued under LMRA section 301(a)[67] for violating the collective bargaining agreement and the union is joined as a defendant for wrongfully refusing to press the grievance. This is because the *Garmon* pre-emption rule has "no application to §301 suits."[68] That is, courts have jurisdiction under section 301(a) over suits by individuals for violation of collective bargaining agreements, regardless of the fact that the conduct complained of is also an unfair labor practice. Thus, when the employee sues his em-

62. *Id.* at 245. The Court is referring to the NLRA.
63. Vaca v. Sipes, 386 U.S. 171 (1967).
64. *Id.* at 179-81.
65. *Id.* at 180.
66. *Id.* at 180-81 where the Court stated:
A primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union duty of fair representation.
67. LMRA § 301(a), 29 U.S.C. § 185(a) (1964).
68. Vaca v. Sipes, 386 U.S. 171, 184 (1967). The Court cited Smith v. Evening News Ass'n, 371 U.S. 195 (1962) for the rule stated.

ployer for breach of the collective agreement under 301(a) and joins his union for breaching its duty in refusing to press the grievance, there will be no pre-emption.[69] The courts and the NLRB, therefore, have concurrent jurisdiction over the fair representation aspect of the grievant's case.

From the foregoing, it can be seen that the employee who alleges that his union has wrongfully refused to process his grievance, which is based upon the employer's violation of the collective agreement, now has a choice of forums. He can bring action in the court using section 301(a) of the LMRA[70] as a basis for jurisdiction, alleging that the employer violated the collective agreement. On the other hand, he can file charges with the NLRB alleging that the union's conduct amounted to a breach of the duty of fair representation and an unfair labor practice.

One advantage of filing charges before the NLRB is that the individual would not be required to pay any litigation expense. Another would appear to be that he could have his case resolved much faster before the Board than before the courts. Further, the fact that the Board is expert in the area of labor relations makes it probable that it could better elucidate and apply standards for fair representation cases.[71]

V. Remedies

A. Judicial

When an individual has a grievance based upon his employer's alleged violation of the collective bargaining agreement and the union refuses to press it, a suit against the employer and union under section 301 may give rise to various remedies.

The Supreme Court has said by way of dicta, that when the employee's action is based upon the employer's alleged breach of contract plus the union's alleged wrongful refusal to press his grievance, "an order compelling arbitration should be viewed as one of the available remedies when a breach of the union's duty is proved."[72] When there is no allegation, however, that the union's refusal was in bad faith, no order compelling arbi-

69. Vaca v. Sipes, 386 U.S. 171, 179-88 (1967).

70. LMRA § 301(a), 29 U.S.C. § 185(a) (1964).

71. *See* Murphy, *The Duty of Fair Representation Under Taft-Hartley*, 30 Mo. L. Rev. 373, 384 (1965); Note, *Refusal to Process a Grievance, The NLRB, and the Duty of Fair Representation: A Plea for Pre-emption*, 26 U. Pitt. L. Rev. 593, 618 (1965).

72. Vaca v. Sipes, 386 U.S. 171, 196 (1967).

tration will be given.[73] Further, there is doubt whether the union would energetically prosecute the arbitration on behalf of an employee to whom it has lost a law suit.

Damages are likewise available in a section 301 suit by an individual against his employer for breach of contract and against his union for wrongful refusal to process his grievance. The Supreme Court has stated that the plaintiff's recovery should be "apportion[ed] . . . between the employer and the union according to the damage caused by the fault of each."[74] Damages caused solely by the employer's breach of the collective agreement, therefore, should not be charged to the union. However, the union should be charged with any increases in the damage resulting from the employer's breach as long as such increases are caused by the union's wrongful refusal to process.

The Court, recognizing that other remedies are available to an individual employee in a section 301 action, has stated that where the arbitrable issues have been substantially resolved during the trial, "equitable relief"[75] may be granted. When the employee's claim is based upon wrongful discharge, such relief could mean reinstatement with back pay.

B. Administrative

As has been mentioned earlier, since a union's breach of its duty of fair representation is also an unfair labor practice, the aggrieved employee may choose to file charges with the NLRB against his union rather than to sue his employer for breach of contract under section 301.

The remedies available to the individual employee in an unfair labor practice case before the Board are similar to those he could receive from the courts, except that the Board does not order damages.

The NLRB can compel arbitration when the union has breached its duty by refusing to process the individual's grievance in bad faith.[76]

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73. *See* Black-Clawson Co. v. International Ass'n of Machinists, 313 F.2d 179 (2d Cir. 1962); Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co., 312 F.2d 181 (2d Cir. 1962).

74. Vaca v. Sipes, 386 U.S. 171, 197 (1967).

75. *Id.* at 196.

76. Local 12, United Rubber Workers v. NLRB, 368 F.2d 12, 24 (5th Cir. 1966), *cert. denied*, 88 S. Ct. 53 (1967).

In *Miranda*,[77] which held that a union violates section 8(b)(1)(A) of the NLRA[78] upon committing a breach of its duty of fair representation, the Board also held that an employer who "participates"[79] in such arbitrary union conduct violates section 8(a)(1).[80] It would appear, therefore, that in a case in which *both* the union and the employer are found guilty of an unfair labor practice, the Board could order reinstatement with back pay. When an employer has not "participated" in the union's breach of duty, however, Board orders affecting him (such as reinstatement) could not issue.

VI. Exhaustion in 301 Action

In order to avoid any problems of jurisdiction, the individual whose union has refused to press his grievance should sue not only his union, but also his employer for breach of contract. Such a joinder will eliminate any difficulty arising from the defendant union's dismissal motions for lack of court jurisdiction based on the doctrine of pre-emption. This pre-emption problem of jurisdiction, however, is only the first major hurdle that the individual must overcome in his section 301 action against his employer. The second, and the most formidable, is the prerequisite that he prove he has "exhausted" his contract remedies.

Pervading all suits by individuals for breach of a collective agreement containing a set grievance procedure is the policy that use of such agreed upon methods for settling labor disputes should be encouraged by the courts. It was, therefore, established in *Republic Steel Corp. v. Maddox*[81] that, while an individual may bring suit against his employer under LMRA section 301,[82] he first "must *attempt* use of the contract grievance procedure . . ."[83] as set out by the collective bargaining agreement, and "must afford the union the opportunity to act on his behalf."[84] Thus, if the individual never attempts to have his union prosecute his grievance, this is a ground for granting the

77. Miranda Fuel Co., 140 N.L.R.B. 181 (1962).
78. NLRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1964).
79. Miranda Fuel Co., 140 N.L.R.B. 181, 185 (1962).
80. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1964).
81. 379 U.S. 650 (1965).
82. Smith v. Evening News Ass'n, 371 U.S. 195 (1962).
83. Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965) (emphasis in original).
84. *Id.* at 653.

employer's motion to dismiss.[85] The more usual case, however, is the one in which the individual has requested that the union process his grievance and it either refuses to prosecute or drops the grievance after pursuing it through only the initial stages of the grievance procedure. The Court in *Maddox* recognized this situation but refused to say whether the union's refusal to press the individual's grievance was sufficient "exhaustion."[86] In *Vaca v. Sipes*,[87] however, the Court addressed itself to this question and found that, in order to overcome the defense of failure to exhaust, the plaintiff must show more than merely the union's refusal to press his claim. He must show that he "has been prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance."[88] That is, he must "prove that the union . . . breached its duty of fair representation in its handling of [his] grievance."[89]

Although this *Vaca* exhaustion rule can be supported by earlier lower court decisions,[90] it drew a strong dissent from Mr. Justice Black. He said that such a rule seriously impairs the individual employee "when he seeks direct judicial relief for his . . . breach-of-contract claim against his employer."[91]

Since 1962, federal courts have had jurisdiction to hear cases under section 301(a) of the LMRA[92] brought by individuals against their employer for violation of the collective bargaining agreement.[93] By now imposing upon the individual the burden of proving not only the contract violation, but also bad faith

85. *See* Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); Doty v. Great Atl. & Pac. Tea Co., 362 F.2d 930 (6th Cir. 1966); Woody v. Sterling Aluminium Prods., Inc., 365 F.2d 448 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967); Henderson v. Eastern Gas & Fuel Associates, 290 F.2d 677 (4th Cir. 1961).

86. Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965) in which the Court stated that "if the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available."

87. 386 U.S. 171 (1967).

88. *Id.* at 185 (emphasis in original).

89. *Id.* at 186.

90. *See* Ostrofsky v. United Steelworkers, 273 F.2d 614 (4th Cir. 1960), *cert. denied*, 363 U.S. 849 (1960); Thrift v. Bell Lines, Inc., 269 F. Supp. 214 (D.S.C. 1967); Fiore v. Associated Transp., Inc., 255 F. Supp. 596 (M.D. Pa. 1966); Brandt v. United States Lines, Inc., 246 F. Supp. 982 (S.D.N.Y. 1964). *But see* Simmons v. States Marine Lines, Inc., 267 F. Supp. 384 (E.D. Pa. 1967); Serra v. Pepsi-Cola Gen. Bottlers, Inc., 248 F. Supp. 684 (N.D. Ill. 1965).

91. Vaca v. Sipes, 386 U.S. 171, 203 (1967) (dissenting opinion).

92. LMRA § 301(a), 29 U.S.C. § 185(a) (1964).

93. Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

on the part of the union in refusing to press his claim, such individual suits will all but be eliminated. This is because a showing that the union refused to press *in bad faith* is nearly impossible to make since the union is given such a wide range of discretion in the handling of grievances.[94] Thus, the practical effect of the rule of exhaustion in *Vaca* will likely be to deny a remedy to an employee, even if he has a meritorious grievance against his employer for violation of the contract.[95]

Reasons for this extended exhaustion rule, weighing the odds against the individual in his breach of contract action against his employer, do not abound. The Court apparently sees a distinct need for allowing the union a great deal of discretion in dealing with borderline grievances as they arise.

The three reasons[96] given by the majority in *Vaca* for allowing the union such great discretion over grievance handling were attacked by Black in his dissent.[97] The majority's first reason was that frivolous grievances would be ended prior to time-consuming and costly arbitration. Black argues, however, that many grievances that are not frivolous will be stymied by the new *Vaca* exhaustion rule. Second, the majority said that allowing the union to settle grievances prior to arbitration will assure consistent treatment of major problem areas in interpretation of the collective bargaining agreement. Black contends, however, that some serious grievances involve no major problem in contract interpretation. Finally, the majority said that such wide discretion furthers the interests of the union, but Black contends that the union's interest is not undermined by requiring it to process all "serious grievances to a conclusion or by allowing the injured employee to sue his employer after he has given the union a chance to act on his behalf."[98]

Black is not alone in his concern for the individual who has a serious grievance which his union refuses to press. Pro-

94. *See* note 41 *supra.*

95. This, in fact, could have happened in *Vaca v. Sipes* in which the employee failed in his charge of breach of the duty of fair representation. Because of this failure, he would, according to the majority, also fail to withstand the employer's exhaustion defense in a section 301 action for breach of contract. Thus, the employee has no remedy even though, in the trial in the state court, the jury had found that his grievance was meritorious.

96. Vaca v. Sipes, 386 U.S. 171, 191 (1967).

97. *Id.* at 209-10 (dissenting opinion). For a more thorough criticism of the reasons usually given for allowing the union such wide discretion over grievances, *see* Note, *Individual Control Over Personal Grievances Under Vaca v. Sipes,* 77 YALE L. J. 559 (1968).

98. Vaca v. Sipes, 386 U.S. 171, 210 (1967).

fessor Blumrosen contends that grievances based upon "critical job interests"[99] should not be allowed to be disposed of by the union in good faith but should be heard on their merits.[100]

> The good faith discretion test does not adequately protect the employee's basic relation to his job. Discharge and seniority cases involving critical job interests should be heard on their merits in some impartial forum. The employee should be allowed to prove that his claim is meritorious. The union would then be required to demonstrate why it rejected his claim . . . . This pattern of proof might make the duty of fair representation more meaningful.[101]

Blumrosen also believes that "there is no evidence that the collective bargaining process would grind to a halt if individual employees were allowed legal protection for their critical job interests."[102] Certainly, in view of the new *Vaca* exhaustion rule and its probable harmful impact upon individual suits against employers for violations of collective bargaining agreements, Blumrosen's ideas merit consideration.

VII. Conclusion

The doctrine of the duty of fair representation is of little help to an employee whose union has refused to process his grievance unless the union's refusal was blatantly intended to discriminate against him. Such a realization casts serious doubt on the Court's statement in *Vaca* that "the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals . . . ."[103]

The Court in *Vaca* cleared up the question of pre-emption that pervaded fair representation cases by holding that the Board and courts should exercise concurrent jurisdiction. However, the Court imposed a new rule of exhaustion to be applied

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99. Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 Mich. L. Rev. 1435, 1485 (1963); Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Autonomy Versus Employee Autonomy*, 13 Rutgers L. Rev. 631, (1959). These cases involving "critical job interests," suggests Blumrosen, include disputes over discharges, wages and seniority.

100. Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 Mich. L. Rev. 1435, 1485 (1963).

101. *Id.*

102. *Id.* at 1494.

103. Vaca v. Sipes, 386 U.S. 171, 182 (1967).

as a prerequisite to suits by individual employees against their employers for violation of the collective bargaining agreement. Not only must the employee show that he has first attempted use of the grievance procedure set out by the contract, but he must now also show that his union has refused to press his grievance in breach of its duty of fair representation. Placing the burden upon the individual of taking on both his employer and his union should cause a serious reduction in individual suits under section 301. The Court apparently feels that such a rule preserves the integrity of the grievance procedure as a method of settling labor disputes.

The individual employee must retain certain rights under a collective bargaining agreement—otherwise he would never have been given the opportunity to sue his employer for breach of that agreement.[104] The *Vaca* exhaustion rule, however, effectively erases such rights by preventing a suit by an employee against his employer for violation of the collective agreement from going to trial on the merits. The Court's desire to protect the collective bargaining process has dealt, therefore, a stinging blow to the individual employee.

James J. Baldwin, III

104. Smith v. Evening News Ass'n, 371 U.S. 195 (1962).